No. 45490-4-II

IN THE COURT OF APPEALS,
DIVISION II OF THE STATE OF WASHINGTON

EDWARD KUNCHICK and KATHERINE KUNCHICK, husband and wife, UP TO GRADE CONCRETE PRODUCTS, INC., a Washington Corporation, and PRECAST CONCRETE INDUSTRIES INC., a Washington corporation

Petitioners,

v.

PETER LAROCK,

Respondent.

On Appeal from Pierce County Superior Court
The Honorable Thomas P. Larkin

Pierce County Superior Court No. 12-2-07379-7

RESPONDENT'S BRIEF

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I. INTRODUCTION

Defendants appeal the final judgment entered in the civil case *LaRock v. Kunchick, et al.*, tried in the Superior Court for Pierce County, before the Honorable Thomas Larkin, from September 3–10, 2013. This case arose from a business dispute between Plaintiff-Respondent, Peter LaRock, and Defendant-Appellant, Edward Kunchick concerning ownership of Defendant-Appellant Precast Concrete Industries, Inc. ("PCI") and its assets.[1] LaRock claimed that he and Kunchick had formed a partnership to operate PCI, to which LaRock made significant capital contributions; that Kunchick later disavowed the partnership, and locked LaRock out of the business; and that Kunchick had refused to return any of the money or property LaRock had contributed, or to pay any compensation due to him under their agreement.

The Trial Court entered judgment for LaRock against Kunchick and PCI on LaRock's claims of unjust enrichment, conversion, and replevin, in the amount of $154,000, plus personal property with an estimated value of $272,590. In this appeal, Defendants seek a new trial on these claims, or, alternatively, a new trial on damages. As LaRock demonstrates in this brief, Defendants have failed to show that the Trial Court committed any reversible error. Accordingly, LaRock respectfully

[1] Pursuant to RAP 10.4(e), the Appellants will hereinafter be referred to by their names, or as "Defendants," and Respondent will be referred to by his name, or as "Plaintiff."

requests that this Court DENY Defendants' request for a new trial, and AFFIRM the judgment of the Trial Court.

II. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

Beginning in or around 2005, LaRock and Kunchick were competitors in the concrete products industry in Washington.[2] LaRock was the sole shareholder of a corporation called AJL Investments, Inc. ("AJL"), through which he did business in Everett, Washington, under the name K&K Concrete Products ("K&K").[3] Kunchick owned a business in Tacoma, Washington, called Up to Grade Concrete Products ("Up to Grade").[4]

Up to Grade went out of business in 2009, and, pursuant to an earlier agreement, Kunchick went to work with LaRock at K&K.[5] LaRock offered to make Kunchick a full partner in the business by giving him 50 percent of K&K's stock.[6] Kunchick, however, was planning to file for bankruptcy, and was concerned about having to declare the stock on his asset schedules.[7] He therefore declined LaRock's offer, preferring to be

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[2] CP 870.
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] RP 80:11–18.
[7] RP 80:19–21.

formally designated only as an employee.[8] Both men nevertheless shared equally in the management of the business, and LaRock treated Kunchick as a co-owner, rather than a subordinate.[9]

When Kunchick moved to K&K, he brought with him a large collection of equipment and tools from Up to Grade, including a set of custom-made concrete forms,[10] with an appraised value of approximately $272,590.[11] Kunchick had previously pledged the forms as collateral to secure a loan from Key Bank.[12] By the time he went to work at K&K, Kunchick had defaulted on the loan, and Key Bank was seeking to repossess and liquidate its collateral.[13]

In April of 2010, a customer of K&K called Granite Precast ("Granite") offered to buy the forms from Key Bank, and Key Bank accepted.[14] Granite then agreed to sell the forms to K&K in exchange for 12 monthly credits to its purchase account.[15] K&K documented its acquisition of the forms in two ways. First, LaRock recorded the total amount of credit given for the forms, $20,000, as an "asset placed in service" on the depreciation-and-amortization schedule to K&K's 2010

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[8] RP 80:21–22.
[9] RP 80:23–81:9.
[10] Concrete forms are steel molds into which concrete is poured to make the products that LaRock and Kunchick sold. RP 77:23–78:12.
[11] CP 870, 875.
[12] CP 870.
[13] *Id.*
[14] *Id.*
[15] *Id.*

tax return.[16] Second, K&K recorded the equipment as an asset on the "property plant and equipment" section of its balance sheet.[17]

After Kunchick began working at K&K, he and LaRock had frequent conversations about the possibility of moving the business to a larger facility and starting a formal partnership.[18] Such a move was not immediately possible, however, because of K&K's poor financial condition.[19] But, in February 2011, K&K lost its lease and was given 90 days' notice of eviction, forcing LaRock and Kunchick to put their plans into action sooner than they anticipated.[20]

At this time K&K and LaRock were in substantial debt, and were receiving demands from creditors for payment.[21] LaRock and Kunchick feared that if they continued to do business as K&K Concrete, the creditors might force them into bankruptcy before they had a chance to restart the business somewhere else.[22] To avoid that scenario, the two agreed that they would move K&K's operation to a new location and continue in business together under a different name.[23] To further protect the business from creditors during the moving process, LaRock and

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[16] RP 93:19–95:12.
[17] RP 96:8–12.
[18] RP 81:16–82:1.
[19] *See* RP 81:17–18.
[20] RP 97:17–98:2; CP 871.
[21] RP 98:12–20.
[22] *Id.*
[23] *See id.*; CP 871.

Kunchick decided that Kunchick would form a corporation, initially as the sole shareholder, to hold the new business's assets and carry on its day-to-day operations.[24] But, they agreed that as soon as the debts were resolved, and/or PCI became profitable enough to pay them, LaRock's name was to be added to the corporate paperwork as a co-owner.[25]

Immediately following the eviction notice, the parties found a new location in Fife, Washington that suited their needs, and began the process of moving K&K's operation.[26] Kunchick took primary responsibility for assembling the new facility, while LaRock hauled K&K's property to the new site.[27] For approximately 100 days, both men worked seven days a week to accomplish the move.[28] By the end, LaRock had hauled to PCI all of the property then in K&K's possession, including office equipment and supplies, furniture, production equipment, tools, and concrete forms.[29] In addition, LaRock bought and delivered gravel, sand, concrete, and steel for the construction of the PCI plant.[30]

At the same time, LaRock also worked to set up PCI's finances.[31] Using his computer at K&K, he created a set of books for PCI with the

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[24] RP 98:21–99:4, 13–15.
[25] CP 871.
[26] *Id.*
[27] *Id*; RP 100:18–23.
[28] CP 871.
[29] *Id.*
[30] *Id.*
[31] *See id.*

software application QuickBooks.[32] In order to provide PCI with monetary capital, he assigned it certain accounts receivable from K&K.[33] With Kunchick's knowledge and approval, LaRock transferred a total of 76 accounts receivable into PCI's books with a combined amount due of approximately $115,534.66.[34] The sales were billed to customers on PCI invoices, and payments on the accounts were received by PCI, but the orders were filled at the K&K location in Everett, by K&K employees, using K&K materials.[35]

Another aspect of the agreement between LaRock and Kunchick was that, in exchange for supplying essentially all of PCI's capital, LaRock would be entitled to share equally in the profits, but would not be required to work full time.[36] They specifically agreed that after PCI had opened and was running smoothly, LaRock would take some time off to visit his daughter in Montana, and also attempt to settle some of K&K's debts.[37] They agreed that during his time in Montana, PCI would make weekly payments to LaRock of $600, and also would pay his monthly truck payments, gasoline credit card, and phone bill.[38]

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[32] *Id.*
[33] RP 105:6–7.
[34] CP 871–72; RP 229:6–18.
[35] CP 872.
[36] RP 162:7–10, 193:23–194:3.
[37] CP 872.
[38] *Id.*

PCI opened for business on June 6, 2011.[39] By late October, it was running smoothly enough to operate without LaRock's presence, and so, according to the agreement, LaRock left for Montana.[40] The agreed-upon $600 weekly payments, however, never arrived.[41] Concerned, LaRock tried to reach Kunchick on the phone to find out why he had not been sending the payments, but Kunchick refused to speak with him.[42] LaRock returned to Washington to confront Kunchick but when he arrived at PCI, he found that the door was locked and that his key did not work.[43] He knocked on the door and was greeted by an employee who, on Kunchick's instruction, blocked his entry and refused to allow him into the office.[44]

LaRock returned to PCI several times, trying to meet Kunchick in person, and eventually encountered him one morning, pulling into PCI's parking lot.[45] Kunchick apologized for locking LaRock out of PCI, and promised to honor their original agreement to run PCI as equal co-owners.[46] Believing the situation had been resolved, LaRock returned to Montana.[47] However, he received no payments from PCI, and no further

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[39] *Id.*
[40] *Id.*; RP 236:1–4.
[41] CP 872.
[42] *Id.*
[43] *Id.*; RP 168:4–6.
[44] CP 872; RP 327:21–24.
[45] CP 872.
[46] *Id.*
[47] *Id.*

communications from Kunchick.[48] Since that time, Kunchick and PCI have continued to use LaRock's property to operate their business and generate profits, but have refused to share those profits with him, return any substantial amount of his property,[49] return his capital contributions (*i.e.*, the accounts receivable), pay him for any of his labor in setting up the PCI facility, or pay any of his agreed-upon compensation.[50]

B. PROCEDURAL BACKGROUND

On March 23, 2012, LaRock and his corporation, AJL Investments, filed suit in Pierce County Superior Court against Edward Kunchick and his wife, Katherine Kunchick, Precast Concrete Industries, Inc., and Up to Grade Concrete Products, Inc., seeking damages for breach of fiduciary duties, a declaratory judgment that a partnership existed between LaRock and Kunchick, an accounting, imposition of a constructive trust, and appointment of a receiver.[51] At that time, LaRock and AJL were represented by attorney David Reed of The Law Offices of David E. Reed, PS.[52] On June 26, 2012, LaRock and AJL filed an amended complaint, adding claims of conversion, unjust enrichment, and

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[48] *Id.*
[49] As discussed below, Defendants have stipulated to returning a small number of items.
[50] CP 872–73, 953–88.
[51] CP 1–6.
[52] CP 6.

replevin.[53] On September 13, 2012, Defendants filed an answer and a counterclaim for abuse of process.[54]

Mr. Reed later withdrew from his representation of LaRock and AJL, and LaRock proceeded to represent himself *pro se*.[55] As a *pro se* litigant, LaRock was prohibited from representing a corporation, and he therefore voluntarily withdrew AJL from the case.[56] On the advice of other counsel, around February 15, 2013, LaRock purchased all of AJL's assets, including its equipment, accounts receivable, investments in other entities, and causes of action, in exchange for LaRock's forgiveness of debt owed to him by AJL in the amount of $49,840.[57] The transaction was recorded in a Bill of Sale, and in AJL's corporate consent minutes.[58]

Both sides then filed motions for summary judgment, which the Trial Court denied.[59] The case went to trial on September 3, 2013 before Judge Thomas Larkin.[60] On the first day of trial, LaRock, then represented by the undersigned counsel, entered into a stipulation with Defendants in which Defendants agreed that certain items of property in their possession

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[53] CP 7–16.
[54] CP 17–24.
[55] RP 85:12–14.
[56] RP 85:14–16.
[57] RP 72:6–9, 205:12–23.
[58] RP 72:12–15.
[59] CP 52–170, 171–241; 353.
[60] RP 3–4.

belonged to LaRock, and that he would be allowed to retake possession of them.[61]

On September 11, 2013, Judge Larkin orally ruled that LaRock and Kunchick had not formed a formal partnership, but that they had made agreements to do business together; that LaRock had transferred K&K's property and accounts to PCI on the understanding that he had an interest in the business; and that LaRock had proved that interest at trial.[62] Judge Larkin awarded LaRock possession of the majority of the personal property he had contributed to PCI, including the concrete forms K&K had purchased from Granite, $112,000 for the accounts receivable, $17,000 for other miscellaneous equipment that K&K contributed to PCI, and $25,000 for payments to which LaRock was entitled during his time in Montana.[63] Judge Larkin also found in LaRock's favor on Defendants' counterclaim of abuse of process.[64]

On October 2, 2013, Judge Larkin sent a letter to both sides, specifying his ruling on each claim.[65] He explained that he found in LaRock's favor on his claims of unjust enrichment, conversion, and

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[61] CP 625–27; RP 27:6–28:19.
[62] RP 518:24–519:6, 519:24–520:2.
[63] RP 519:17–520:7.
[64] RP 520:15–16.
[65] CP 895–96.

replevin, and on Defendants' counterclaim of abuse of process.[66] Judge Larkin stated that he had not found that a formal partnership existed between the parties, and that he found in Defendants' favor on the breach of fiduciary duties claim.[67]

On October 11, 2013, LaRock presented proposed findings of fact and conclusions of law, and a proposed order and judgment, in accord with Judge Larkin's letter and oral ruling, which the Trial Court signed and entered.[68]

III. STATEMENT OF ISSUES

1. Have Defendants waived review of their motion for summary judgment by failing to assign error to the Trial Court's ruling on that motion or to provide any argument in their brief regarding the motion, and by attempting instead to incorporate their summary judgment briefing into their appellate brief by reference?

2. Have Defendants waived their argument concerning disregard of the corporate form by failing to raise the argument at trial?

3. Did the Trial Court disregard the corporate form of Defendant PCI when it found Defendant Edward Kunchick liable in his individual capacity, for his own acts of conversion and unjust enrichment, some of

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[66] CP895.
[67] *Id.*
[68] CP 866–943.

which were carried out, at his direction and with his knowledge and approval, through PCI?

4. Did Plaintiff Peter LaRock have standing to prosecute this action for the restitution of money and personal property, formerly belonging to his wholly-owned corporation, AJL Investments, by virtue of his purchase of the assets of that corporation, including its rights of action, or on any other basis?

5. Did the Trial Court properly award LaRock restitution, despite its finding that both LaRock and Kunchick had acted inequitably with respect to third parties, and despite the fact that LaRock did not attempt to prove the inadequacy of contract damages, where the Trial Court did not find that LaRock engaged in any inequitable conduct toward the Defendants, or that any specific contract between them existed?

6. Did the Trial Court properly determine the parties' respective ownership interests in the disputed property, and the amount of LaRock's recovery, without reference to the law of partnership, where the Trial Court did not find that a partnership existed?

7. Did the Trial Court properly find Defendants liable for conversion of LaRock's property, notwithstanding LaRock's consent to the property's use in a joint business venture between himself and Defendant Kunchick for the purpose of making joint profits, where

Defendants exceeded the scope of that consent by locking LaRock out of the business, refusing to share with him any profits derived from the property's use, and refusing to return the property on his demand?

IV. ARGUMENT

A. DEFENDANTS HAVE WAIVED REVIEW OF THE TRIAL COURT'S DENIAL OF THEIR MOTION FOR SUMMARY JUDGMENT.

Defendants purport to appeal the Trial Court's denial of their summary judgment motion.[69] This Court should not review that ruling, because Defendants have failed to properly address it in their brief, and have therefore waived review.

Issues that are neither argued nor identified in an appellant's assignments of error are not eligible for appellate review. *See Ang v. Martin*, 154 Wn.2d 477, 487, 114 P.3d 637, 643 (2005) (citing *State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995) ("when an appellant fails to raise an issue in the assignments of error, in violation of RAP 10.3(a)(3), and fails to present any argument on the issue or provide any legal citation, an appellate court will not consider the merits of that issue")) (emphasis omitted).

[69] Appellants' Br. at 1.

The first line of Defendants' brief states that they are appealing the Trial Court's decision to deny their motion for summary judgment,[70] but they fail to assign error to that decision in their Assignments of Error,[71] or to identify it as an issue in their Issues Pertaining to Assignments of Error,[72] and they fail to offer any argument on the subject anywhere in their brief.[73] Instead, Defendants purport to incorporate their summary judgment briefing into their appellate brief by reference.[74] That is not permissible. As this Court recently observed, "Washington courts 'have consistently rejected attempts by litigants to incorporate by reference arguments contained in trial court briefs, holding that such arguments are waived.'" *Multicare v. State, Dep't of Soc. & Health Servs.*, 173 Wn.App. 289, 299, 294 P.3d 768, 773 (2013) (quoting *Kwiatkowski v. Drews*, 142 Wn.App. 463, 499–500, 176 P.3d 510 (2008). *See also U.S. West Commc'ns, Inc. v. Wash. Utils. & Transp. Comm'n*, 134 Wn.2d 74, 111–12, 949 P.2d 1337 (1997) ("briefs presented to the trial court cannot be incorporated by reference into an appellate brief.") (citing *Patterson v. Superintendent of Pub. Instruction*, 76 Wn.App. 666, 676, 887 P.2d 411 (1994)).

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[70] Appellants' Br. 1.
[71] *Id.* at 4.
[72] *Id.*
[73] *Id., passim.*
[74] *Id.* at 1.

Because Defendants have not properly raised in their brief the issue of the denial of their summary judgment motion, and because their attempt to incorporate the motion into their brief by reference is ineffective, this Court should consider the issue waived.

B. THERE IS NO ISSUE OF CORPORATE DISREGARD FOR THIS COURT TO REVIEW, BECAUSE THE TRIAL COURT DID NOT DISREGARD DEFENDANT'S CORPORATE IDENTITY, AND BECAUSE DEFENDANTS DID NOT RAISE THE ISSUE AT TRIAL.

Defendants argue that because LaRock did not prove a basis at trial for disregarding PCI's corporate identity, Kunchick should not have been held personally liable on any of LaRock's claims, which Defendants imply were based solely on the conduct of PCI. The Court should not consider this argument, because Defendants failed to raise it at trial, and because it does not fall into any of the categories of issues that may be raised for the first time on appeal. If the Court does consider this issue, it should reject Defendants' argument, because the Trial Court held Kunchick liable for his own conduct, and did not disregard PCI's corporate identity.

1. *Defendants Did Not Raise Corporate Disregard As an Issue at Trial, and RAP 2.5 Bars Them from Raising It for the First Time on This Appeal.*

Kunchick contends that he cannot be held individually liable on Plaintiff's claims of conversion, replevin, and unjust enrichment, because Plaintiff did not prove the elements necessary to disregard PCI's corporate

identity.[75] As discussed below, this argument is meritless. Additionally, the Court need not even consider the argument on the merits, because Defendants have improperly raised it for the first time on this appeal.

The general rule on appeal is that the court "will not review an issue, theory, argument, or claim of error not presented at the trial court level." *Mukilteo Ret. Apartments, L.L.C. v. Mukilteo Investors L.P.*, 176 Wn.App. 244, 258, 310 P.3d 814, 821 (2013); *see also State v. Ford*, 171 Wn.2d 185, 188, 250 P.3d 97, 99 (2011) ("Appellate courts typically will not consider an issue raised for the first time on appeal.") (citing RAP 2.5(a)).

RAP 2.5(a) provides three exceptions to this general rule, none of which is applicable here: "(1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right." The issue of corporate disregard is clearly not jurisdictional, and Defendants have not claimed an infringement of any constitutional right. Only the second exception, "failure to establish facts upon which relief can be granted," could arguably apply. This exception, by its terms, applies only to facts that must be proven in order to obtain relief. *Mukilteo Apartments*, 176 Wn.App. at 259. "If 'relief can be granted' despite the absence of particular facts, an appellant cannot

[75] *Id.* at 9.

thereafter invoke RAP 2.5(a)(2) in order to argue for the first time on appeal that such facts were not established." *Id.*

Defendants do not assign error to any of the Trial Court's findings of fact as to Kunchick's conduct, nor do they dispute that those facts establish *prima facie* cases of conversion, unjust enrichment, and replevin. Instead, they simply recite the elements that must be proved to justify disregard of the corporate form, without any explanation of why the Trial Court needed to disregard PCI's corporate form in order to hold Kunchick liable. Since Defendants have failed to establish that relief could not be granted on the facts proven at trial, they cannot rely on RAP 2.5(a)(2).

Accordingly, since the issue of corporate disregard was not raised at trial, and since none of the exceptions listed in RAP 2.5(a) apply, the Court should not consider Defendants' assignment of error.

2. *The Trial Court Did Not Disregard the Corporate Identity of Precast Concrete Industries when It Held Kunchick Personally Liable Based on His Own Tortious and Inequitable Conduct.*

The Trial Court made a legal conclusion that Kunchick is personally liable to LaRock for conversion, replevin, and unjust enrichment.[76] It based that conclusion on its findings of fact regarding

[76] CP 876, 890.

Kunchick's own conduct.[77] It is unclear whether Defendants assign error to the Trial Court's factual findings or legal conclusions, but their argument is meritless as to both.

To successfully challenge a trial court's factual findings "[t]he appellant must present argument to the court why specific findings of fact are not supported by the evidence and must cite to the record to support that argument." *MHM & F, LLC v. Pryor*, 168 Wn.App. 451, 461, 277 P.3d 62, 67 (2012) (quoting *Inland Foundry Co. v. Dep't of Labor & Indus.*, 106 Wn.App. 333, 340, 24 P.3d 424 (2001)) (internal quotation marks omitted). Defendants have completely failed to show that any of the Trial Court's findings are not supported by the record. An appellate court reviews a trial court's findings of fact under a *substantial evidence* standard, defined as "a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369, 372 (2003). The Trial Court's findings of fact as to Kunchick's conduct were as follows:

> Although LaRock and Kunchick did not enter into a formal partnership agreement, from the time K&K was evicted from its Everett location in February of 2011 until LaRock left for Montana in October of 2011, *they* acted, for all intents and purposes, as though they were co-owners of PCI. LaRock's conduct during this time can only be explained by an expectation of co-ownership in that

[77] CP 873–75.

business. Based on the overall course of conduct of *both the parties*, that expectation was reasonable. The actions that LaRock took in reliance on that expectation accrued to the significant benefit *of Kunchick* and PCI. Specifically, LaRock conferred benefits *on Kunchick* and PCI in the form of: labor and services with a value of approximately $25,000; accounts receivable in the amount of $112,000; and personal property....

...

Kunchick and PCI were and are aware of these benefits.

...

Defendants have refused to acknowledge LaRock's ownership interest in PCI, and have neither returned, nor paid the value of, the majority of the benefits that he conferred.

...

Under these circumstances, it would be inequitable to allow *defendants* to retain the benefits without paying their full value.

...

Defendants are in possession of the personal property described in paragraph B(1)(a)-(d) of this section, above (pp. 8-9), which was formerly in the possession of Peter LaRock and K&K.

...

LaRock allowed, or caused K&K to allow, defendants *Kunchick* and PCI to possess and use this property for the purpose of earning profits, in which he would be entitled to share.

...

Defendants have used, and continue to use, this property to earn profits, but refuse to share them with LaRock, and

> have likewise refused LaRock's demand for the property's return.[78]

These findings clearly show that the Trial Court found both PCI and Kunchick, personally, to have participated in the conduct that gave rise to their liability. It is therefore nonsensical for Defendants to assign error on the grounds that the Trial Court heard no evidence "as to why the PCI [sic] should not be distinct from Appellants Edward Kunchick and Katherine Kunchick."[79] As its findings show, the Trial Court did treat PCI and Kunchick as distinct; that is why all of the relevant findings either refer to each of them separately by name, or as "Defendants" in the plural.

More importantly, Defendants present no argument that any of these factual findings are not supported by substantial evidence, and they make no citations to the record whatsoever. Accordingly, any challenge to these findings not only necessarily fails on the merits, but should not even be considered by this Court. *See In re Welfare of H.S.*, 94 Wn.App. 511, 520, 973 P.2d 474, 480 (1999) (appellate court need not consider any assignment of error not supported by citations to the record) (citing *In re Discipline of Haskell*, 136 Wn.2d 300, 310–11, 962 P.2d 813 (1998)).

Defendants' corporate disregard argument, similarly fails as a challenge to the Trial Court's legal conclusion. The standard of review for

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[78] CP 873–75 (all emphases added).
[79] Appellants' Br. at 9.

a trial court's conclusions of law is whether the conclusions are supported by the court's findings of fact. *See Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234, 1240 (1999). Defendants have offered no argument whatever as to why liability for conversion, unjust enrichment, and replevin are not supported by the Trial Court's factual findings concerning Kunchick's own actions.

At best, Defendants may be implying that the Trial Court erred in not assuming that Kunchick was acting at all relevant times in his capacity as an officer of PCI, rather than his individual capacity, and that a corporate disregard analysis is somehow a prerequisite to finding otherwise. If that is what they mean to argue, the Court need not give it any consideration, as they offer no legal authority at all for that position. *See City of Bremerton v. Sesko*, 100 Wn.App. 158, 162, 995 P.2d 1257, 1259 (2000) (an "appellate court need not consider arguments for which party has not cited authority.") (citing *State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990)).

Finally, any doubt that Defendant's argument is wholly without merit is dispelled by the responsible-corporate-officer doctrine. Under that doctrine, "'[i]f a corporate officer participates in the wrongful conduct, or knowingly approves of the conduct [of a corporation], then the officer, as well as the corporation, is liable for the penalties.'" *K.P. McNamara Nw.,*

Inc. v. State, Washington Dep't of Ecology, 173 Wn.App. 104, 142, 292 P.3d 812, 830 (2013) (quoting *Dep't of Ecology v. Lundgren*, 94 Wn.App. 236, 243, 971 P.2d 948 (1999)). "An officer is liable to the same extent whether he personally participated in the wrongful conduct or merely approved of it." *Nationscapital Mortgage Corp. v. State Dep't of Fin. Institutions*, 133 Wn.App. 723, 767, 137 P.3d 78, 100 (2006). "In order to hold a corporate officer personally liable for a corporation's wrongful conduct, the [plaintiff] need only show that the officer had the responsibility and authority either to prevent a violation in the first instance or to promptly correct it, but failed to do so." *Id.* (citing *Lundgren*, 94 Wn.App. at 244, 971 P.2d 948 (quoting *United States v. Park*, 421 U.S. 658, 673–74, 95 S.Ct. 1903, 44 L.Ed.2d 489 (1975))).

There can be no serious argument that Kunchick did not participate in, direct, and approve of the tortious and inequitable conduct that the Trial Court found in this case. Corporations are only capable of acting through their officers, directors, and agents. *Broyles v. Thurston Cnty.*, 147 Wn.App. 409, 428, 195 P.3d 985, 995 (2008). Kunchick testified at trial that it was he who instructed his employees not to allow LaRock to enter PCI.[80] He testified at one of his depositions that he is "in charge of paying

[80] RP 327:21–24.

money out at PCI,"[81] and that it was he who refused Mr. LaRock's request for back-wages after locking him out of PCI.[82] In short, as he testified at trial, Kunchick "handle[s] just about every aspect of the business that there is to handle."[83] Thus, even if it were true that LaRock's injuries were caused solely by the acts of PCI, the evidence compels the conclusion that Kunchick not only had the responsibility and authority to prevent or correct those acts, but that he personally directed them, making him personally liable under the responsible-corporate-officer doctrine. The Trial Court had no need to consider disregarding PCI's corporate form before holding Kunchick liable.

C. LaRock Has Standing to Prosecute This Action, Based on His Lawful Acquisition of the Assets of AJL Investments, Inc.

Defendants assign error to what they characterize as the Trial Court's legal conclusions that: (1) AJL's sale of assets to LaRock was "valid"; and (2) that LaRock consequently has standing to prosecute this action.[84] This argument is predicated on Defendants' assertion that the money and personal property at issue in this case were transferred directly from AJL to PCI, and were never the property of LaRock, in his individual

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[81] CP 704.
[82] RP 309:5–8.
[83] RP 311:16–17.
[84] Appellants' Br. at 4, 12–13.

capacity.[85] Therefore, Defendants maintain, their unjust enrichment and conversion only injured AJL, and not LaRock.

The specific conclusion of law that the Trial Court made regarding this issue was that: "LaRock now holds all assets and liabilities formerly belonging to AJL investments, Inc., including any rights of action that may have accrued to it during the times relevant to this lawsuit."[86] This conclusion follows from the Trial Court's finding of fact that: "On February 13, 2013, LaRock caused AJL to sign a bill of sale, transferring all of its assets and liabilities to him personally."[87]

Defendants do not dispute the Trial Court's finding of fact in this respect, but they contend that that finding does not support the Trial Court's legal conclusion that Mr. LaRock has standing in this suit, because: (1) the transfer of assets is void under Washington's Uniform Fraudulent Transfers Act ("UFTA"); and/or (2) the transfer is void under RCW 23B.06.400(2), which prohibits certain types of corporate distributions to shareholders. Accordingly, the standard of review for this assignment of error is whether the Trial Court's finding that AJL sold its assets, including its rights of action, to LaRock, supports the legal conclusion that LaRock now owns those assets and causes of action,

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[85] *Id.* at 13.
[86] CP 875.
[87] CP 873.

giving him standing to prosecute this suit. *See Landmark*, 138 Wn.2d at 573, *supra*.

1. *LaRock's Purchase of AJL's Assets Was Neither Fraudulent nor Void under the UFTA, and Defendants Cannot Avoid the Transfer Because They Are Not Creditors of AJL.*

Defendants' first argument is that ownership of AJL's assets was never effectively transferred to LaRock because the purported sale was fraudulent, and therefore void, under § 19.40.051(a) of the UFTA. That provision reads:

> (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

This argument fails for three reasons. The first, and most basic, is that Defendants have failed to establish, or even allege, the necessary elements of a fraudulent transfer under §19.40.051(a). Namely, they do not claim in their brief that: (1) AJL was insolvent at the time of the transfer, or was made insolvent by the transfer; or (2) that AJL did not receive reasonably equivalent value for its assets from LaRock. And, the record, at least with respect to the issue of reasonably equivalent value, does

not support such a claim. In exchange for AJL's assets, LaRock forgave a debt of $49,840 that AJL owed to him.[88] Defendants neither dispute this fact, nor make any effort to establish that the amount of LaRock's debt was not reasonably equivalent in value to AJL's assets at the time of the sale. Nor could they, given that the actual recovery of those assets was contingent on the outcome of litigation, which is inherently both uncertain and costly.

The second fatal defect in Defendants' argument that the transfer of assets was "null and void" under the UFTA, is that it is directly contrary to the language of the statute. Transfers found to be fraudulent under the UFTA are voidable, not void.

> Every reference to the creditor's remedies under UFTA is to avoidance of the fraudulent transfer or to its voidability. *See* RCW 19.40.071 (a creditor may seek avoidance of the transfer); RCW 19.40.081 (defining when a transfer is voidable and when a good faith transferee may retain an interest even when the transfer is voidable). In particular, RCW 19.40.081(d) provides that "[n]otwithstanding voidability of a transfer or an obligation under this chapter, a good-faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to: (1) [a] lien on or a right to retain an interest in the asset transferred." This last provision clarifies that a good faith obligee ... obtains a valid interest in an asset even if the transfer of that asset is later determined to be fraudulent and voidable. In contradistinction to the term "void," which means "[o]f no legal effect[,] null," "voidable" is defined as "[v]alid until annulled." Black's Law Dictionary 1568 (7th

[88] RP 72:6–9, 205:12–23.

ed.1999). Accordingly, under UFTA a fraudulent transfer is valid until annulled.

Associates Hous. Fin. L.L.C. v. Stredwick, 120 Wn.App. 52, 59, 83 P.3d 1032, 1036 (2004). Accordingly, even if LaRock's acquisition of AJL's assets had been fraudulent under the UFTA— which it was not, and which Defendants cite no evidence from the record to prove — it would nevertheless be valid until voided pursuant to one of the UFTA's provisions. Defendants cite no evidence from the record suggesting that the transfer has ever been so voided. Accordingly, as far as the UFTA is concerned, the transfer of assets from AJL to LaRock remains valid to this day, and would be so even if it were transparently fraudulent. The UFTA therefore does nothing to undermine the Trial Court's legal conclusion that LaRock is the rightful owner of AJL's assets and causes of action.

Lastly, Defendants' argument must fail to the extent it implies that, if the transfer was not already void at the time of trial, the Trial Court itself should have voided it, based on Defendants' objections. The Trial Court would have had no authority to do so, as avoidance is a remedy that the UFTA affords only to creditors of the debtor who has made the allegedly fraudulent transfer. *See, e.g., In re Lucas Dallas, Inc.*, 185 B.R. 801, 805 (B.A.P. 9th Cir. 1995) (interpreting provision in California Uniform Fraudulent Transfer Act, substantively identical to Washington

counterpart,[89] § 19.40.071, and concluding that "[on its face the [Act] only confers standing upon a 'creditor' of the debtor."). Neither Kunchick nor PCI are creditors of AJL, and they had no standing to invoke the UFTA.

One final deficiency in Defendants' UFTA argument is their assertion that all of AJL's assets were encumbered by security interests at the time of the sale.[90] If Defendants are right, then no "transfer" under the UFTA occurred at all, because the UFTA does not apply to a transfer of property subject to a security interest.

> The UFTA only applies to "transfers" between creditors and insolvent debtors. *See* RCW 19.40.041-051. Under the UFTA, a "transfer" is any disposition of or parting with an "asset." RCW 19.40.011(12). The UFTA defines assets as "property of a debtor, but the term does not include: ... [p]roperty to the extent it is encumbered by a valid lien."

Eagle Pac. Ins. Co. v. Christensen Motor Yacht Corp., 85 Wn.App. 695, 702-03, 934 P.2d 715, 719 (1997) (citing RCW 19.40.011(2)(i)), aff'd, 135 Wn. 2d 894, 959 P.2d 1052 (1998). The UFTA defines a lien as "a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien." RCW § 19.40.011(8). A lender's

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[89] *Compare* CAL.CIV.CODE § 3439.07 (Appendix 1) *with* RCW § 19.40.071 (Appendix 2).

[90] Appellants' Br. at 12.

interest in collateral on a loan, such as Defendants describe, is clearly "an interest in property to secure payment of a debt."[91]

Defendants cite no evidence from the record to support their contention that all of AJL's assets had been pledged as security, but if that is the case, then it is one more ground on which Defendants' argument fails.

2. *AJL's Sale of Assets Is Not Voided by Washington Statutes Governing Corporate Distributions to Shareholders.*

Defendants' second argument is that AJL's assets were not effectively transferred to LaRock because "[u]nder RCW 23B.06.400(2), once a corporation had [sic] been administratively dissolved, shareholders take a back seat to non-shareholders (creditors)."[92] This is nonsensical. In the first place, the Trial Court made no finding that AJL was administratively dissolved at the time of the transfer, and Defendants cite no evidence to support such a finding. It also is unclear what the significance of AJL's administrative dissolution would be, since the statute that Defendants cite says nothing about the priority of the distribution of corporate assets after dissolution. In fact, the statute does not say anything resembling what Defendants claim it says. It reads:

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[91] The UFTA further defines a "Valid Lien" as "a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings." RCW § 19.40.011(13). Plaintiff can only assume that Defendants intended to allege that the security interests in AJL's assets were valid in this sense.

[92] Appellants' Br. at 13.

(2) No distribution may be made if, after giving it effect:

> (a) The corporation would not be able to pay its liabilities as they become due in the usual course of business; or
>
> (b) The corporation's total assets would be less than the sum of its total liabilities plus, unless the articles of incorporation permit otherwise, the amount that would be needed, if the corporation were to be dissolved at the time of the distribution, to satisfy the preferential rights upon dissolution of shareholders whose preferential rights are superior to those receiving the distribution, and it concerns corporate distributions to shareholders, not sales of assets or liabilities.

RCW § 23B.06.400(2). There is nothing here concerning a priority of creditors over shareholders after dissolution. The only reference to dissolution of any kind simply says that if a corporation is going to make a distribution to a shareholder, it has to retain enough assets to satisfy the rights of other, more preferred, shareholders.

In addition, § 23B.06.400(2) concerns shareholder distributions, while the transaction that Defendants are challenging is a sale of assets. On its face, the transaction appears to have been a sale by AJL of all of its assets, not in the regular course of business, as allowed by § 23B.12.020.[93]

[93] "A corporation may sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property, otherwise than in the usual and regular course of business, on the terms and conditions and for the consideration determined by the corporation's board of directors, if the board of directors proposes and its shareholders approve the proposed transaction." RCW § 23B.12.020(1).

For all of the reasons discussed in this section, Defendants' attempts to invalidate LaRock's acquisition of AJL's property and rights of action are legally baseless and unsupported by the record. Defendants have failed to meet their burden to demonstrate that the Trial Court's legal conclusion — that LaRock owns the property at issue in this case and has standing to sue for its recovery — is not supported by its findings of fact.

D. THE TRIAL COURT PROPERLY AWARDED LAROCK RESTITUTION AND REPLEVIN OF HIS MONEY AND PERSONAL PROPERTY, BASED ON ITS FINDING THAT DEFENDANTS HAD CONVERTED THESE ASSETS AND WERE UNJUSTLY ENRICHED BY RETAINING THEIR BENEFIT.

1. *LaRock's Hands Are Clean as to Defendants Edward Kunchick and Precast Concrete Industries, Inc.*

Defendants contend that LaRock was not entitled to a restitution remedy because the Trial Court found that both parties had engaged in dishonest behavior.[94] Defendants are simply incorrect that a plaintiff who has engaged in inequitable conduct is *per se* barred from obtaining equitable relief. "The authorities are in accord that the 'clean hands' principle does not repel a sinner from courts of equity, nor does it disqualify any claimant from obtaining relief there who has not dealt unjustly *in the very transaction concerning which he complains.*" *McKelvie v. Hackney*, 58 Wn.2d 23, 31-32, 360 P.2d 746, 752 (1961)

[94] Appellants' Br. at 14.

(quoting *J. L. Cooper & Co. v. Anchor Securities Co.*, 9 Wn.2d 45, 113 P.2d 845, 858 (1941)) (emphasis in quotation).

In order for a plaintiff to be barred from recovery in equity under the unclean hands doctrine, the court must find that the plaintiff acted inequitably in his dealings with the defendant, and not some other party. *Id.* ("Fraud or inequity practiced against a third person, who does not complain, does not close the doors of equity to a plaintiff guilty of no inequity as against a defendant."); *accord Trident Seafoods Corp. v. Commonwealth Ins. Co.*, 850 F.Supp.2d 1189, 1203 (W.D. Wash. 2012) ("The clean hands doctrine only precludes a party from obtaining equitable relief if the party has committed willful misconduct that has an immediate and necessary relation to the requested relief.") (citing *J.L. Cooper,* 9 Wn.2d at 73).

Defendants cite no record evidence suggesting that LaRock ever acted inequitably toward them. In fact, the statement Defendants quote from the Trial Court's oral ruling shows the opposite. Referring to LaRock and Kunchick, the Court said:

> [B]oth of you were dishonest, illegal, and you did a lot of things that were unnecessary. Both of you worked under the table, slipped money under the table, off the books and were collecting unemployment. And why did you do this. Tough times sometimes require people to do bad things, and that's what happened here. And you did those bad things in hopes of saving this business that the two of you

> were working on. You were up there working all these hours collecting unemployment and not taking a paycheck because you were trying to save that business. You'd already lost the other one down below. And there you are.[95]

Far from demonstrating inequity by LaRock toward Defendants, the Trial Court's comments reflect a finding that LaRock and Kunchick were working closely together and making joint sacrifices for a business in which they both had a stake. There was indeed inequity between the parties in this case, but the Trial Court found that it ran in one direction only: from Defendants to LaRock.[96] The fact that some of their cooperative efforts may have been inequitable as to some third party does nothing to prevent LaRock from obtaining equitable relief against Defendants.

2. *The Trial Court Properly Determined Each Party's Ownership Interest in the Disputed Property, and the Amount of Plaintiff's Remedy, Without Reference to the Law of Partnership, Because It Did Not Find That a Partnership Existed.*

Defendants assign error to the Trial Court's legal conclusions regarding LaRock's ownership interest in the disputed property, and the measure of his damages and/or restitution interest. In support, they advance two mutually exclusive theories: (1) that the Trial Court failed to

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[95] CP 927:10–19.
[96] *See* CP 874.

determine whether LaRock and Kunchick formed a partnership, and that the absence of such a determination somehow invalidates the Trial Court's ruling on the unjust enrichment and conversion claims;[97] and, (2) that the Trial Court ruled that a partnership *did* exist, and that the Court therefore should have applied partnership law to determine the parties' respective interests in the disputed property.[98] Both arguments are factually and legally frivolous.

First, Defendants fail to explain how the Trial Court either found that a partnership existed or failed to resolve the issue. The Trial Court found as a matter of fact that "LaRock and Kunchick ... did not enter into a formal partnership agreement,"[99] and held as a matter of law that "Plaintiff is not entitled to a declaratory judgment that a partnership exists between himself and defendant, Edward Kunchick."[100] Ignoring these findings and conclusions, Defendants latch on to an arguably ambiguous portion of the Trial Court's oral ruling in which Judge Larkin said: "[Y]our actions convince me that there was an agreement. If it looks like a

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[97] Appellants' Br. at 17 ("[T]he real problem is that the trial court's ruling was based on its unwillingness to conclusively determine if a partnership existed here or not.").
[98] *Id.* at 16 ("Again, it appears that one [sic] the one hand, the court held there was a partnership, and on the other failed to take into account the legal implications of such a ruling.").
[99] CP 873.
[100] CP 875.

duck, it walks like a duck and quacks like a duck, it's a duck, as they say. And that's kind of what happened here. And you did business together."[101]

Conspicuously absent from this passage is the word *partnership.* And, indeed, immediately preceding those remarks, Judge Larkin had said "On the issue of the partnership, there was never a formal agreement making you two partners. You never put that together in any way."[102] Admittedly, together these statements could be ambiguous in that they might be read, as Defendants apparently seek to do now, to mean that LaRock and Kunchick formed an implied partnership, but not an express one. Any such ambiguity, however, was quickly dispelled when Judge Larkin issued a letter summarizing and clarifying his rulings. With respect to the partnership claim, the letter stated:

> The Partnership, I find that there was no formal agreement between the parties. The Plaintiff did not allege that PCI was a partnership. I can't find that a partnership existed at the time. The parties had different agreements between each other and at times had agreed to do business together.[103]

The statement "I can't find that a partnership existed at the time," simply cannot be transmuted into "this was a partnership," which is what Defendants claim the Trial Court said.[104]

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[101] Appellants' Br. at 15 (citing CP 929:2–6).
[102] RP 518–19.
[103] CP 895.
[104] Appellants' Br. at 15.

Further, even if it were still arguable, in view of Judge Larkin's letter, that the Trial Court's oral ruling could be read as finding a partnership (which it cannot), that fact would be of no moment in this appeal. As this Court has observed, "if an oral decision conflicts with a written decision, the written decision controls. *Stiles v. Kearney*, 168 Wn.App. 250, 258, 277 P.3d 9, 13 (2012) (citing *Ferree v. Doric Co.*, 62 Wn.2d 561, 567, 383 P.2d 900 (1963)). This is because "[a]n oral decision is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned," and therefore "has no final or binding effect, unless formally incorporated into the findings, conclusions, and judgment." *Id.* (quoting *Ferree*, 62 Wn.2d at 567, 383 P.2d 900) (internal quotation marks omitted). Here, both the transcript of the Court's oral ruling and its subsequent letter to counsel are attached to the findings and conclusions as exhibits,[105] but nothing in the findings and conclusions indicates that they are "formally incorporated" therein.

In sum, Defendants' assertion that the Trial Court either found that a partnership existed, or failed to resolve the issue, is a complete fiction. This fact disposes of most of the issues raised with respect to Defendants' third and fourth assignments of error, specifically the arguments: (1) that the Trial Court did not properly determine each party's interest in the

[105] CP 883–96.

disputed property because it did not treat the property as belonging to a partnership;[106] (2) that Plaintiff was not entitled to the equitable remedy of restitution because he did not plead or prove that damages under the partnership contract would have been inadequate;[107] and (3) that the Trial Court's judgment was not "the natural consequence of a determination on the central issue."[108] Because the Trial Court did not find that a partnership existed, none of these arguments can possibly establish that the Trial Court's legal conclusions on liability and damages were not supported by its findings of fact.[109]

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[106] Appellants' Br. at 15–16.

[107] Appellants' Br. at 16–17.

[108] *Id.* at 17. Furthermore, this argument was legally incomprehensible to begin with. Defendants offer no legal authority whatever to explain why a trial court would be prohibited from making findings of fact or conclusions of law on one claim before deciding another. And, strictly speaking, the Trial Court was under no obligation to decide definitively whether a partnership did or did not exist. The question before it was whether Mr. LaRock carried his burden of proof so as to be entitled to a declaratory judgment that a partnership existed. Once the Court concluded that Plaintiff had not met that burden, there was no need for it to inquire further.

[109] Furthermore, even if the Trial Court had found a partnership, Defendants' argument that Mr. Kunchick is entitled to half of the disputed property would still be nonsensical. The partnership that Plaintiff alleged in his complaint was a partnership between himself and Edward Kunchick to own and operate a business together called Precast Concrete Industries, Inc. CP 9. If such a partnership existed, Mr. Kunchick would indeed have acquired a 50 percent interest in the accounts-receivable that Mr. LaRock contributed. But, that is because both men would have acquired a 50 percent interest in the entire business, including all of its assets — not just the accounts receivable from K&K — and all its profits. That is precisely the division that Plaintiff sought by claiming a partnership in this suit, and it is precisely what Defendants successfully resisted.

3. *The Trial Court's Calculation of Damages Is Supported by its Finding of Fact That Defendant Kunchick Retained the Benefits of Plaintiff's Contributions, and That Finding Is Supported by Substantial Evidence.*

Defendants argue that the Trial Court erred in calculating damages because it did not make a factual finding as to what benefit Mr. Kunchick retained from Mr. LaRock's contributions. This is incorrect. The Trial Court did, in fact, make findings as to the benefits retained by Mr. Kunchick and PCI. The Trial Court found that:

> The actions that LaRock took ... accrued to the significant benefit of Kunchick and PCI. Specifically, LaRock conferred benefits on Kunchick and PCI in the form of: labor and services with a value of approximately $25,000; accounts receivable in the amount of $112,000; and personal property, including the following:
>
> a. The personal property identified in the Stipulation and Order, entered at the beginning of trial (attached as Exhibit A);
>
> b. A cement silo, financed by Kurt Ramcke;
>
> c. All the personal property purchased by K&K from Granite Precast, including the personal property listed in Trial Exhibit 114 (attached as Exhibit D to these Findings and Conclusions) ...; and
>
> d. Other personal property with a value of approximately $17,000.[110]

Defendants do not dispute these findings with respect to PCI. At best, their argument could be construed as claiming that these findings are

[110] CP 873–74.

not supported by substantial evidence as to Kunchick. That argument would necessarily fail, as Defendants do not identify any specific finding that they dispute, or support their argument with any citations to the record. *See MHM & F, LLC v. Pryor*, 168 Wn.App. at 461, *supra* (appellant must assign error to specific findings of fact).

Even if, contrary to the Trial Court's findings, only PCI had been directly enriched by the receivables and the equipment that Plaintiff contributed, there is ample evidence in the record that Kunchick reaped substantial consequential benefits in the form of profits from operating PCI. In his February 6, 2013 deposition, Kunchick testified that he earned approximately $65,000 in salary in 2012, and that he took an additional $30,000 in loans, draws or bonuses.[111] At $95,000 a year, between the time PCI opened for business on June 6, 2011, and the date the judgment was entered, October 11, 2013, Kunchick would have been enriched by approximately $223,312 in profit and compensation. Such consequential gains are recoverable in restitution. *See* Restatement (Third) of Restitution and Unjust Enrichment § 53 (2011).[112] Accordingly, Defendants have

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[111] CP 641.

[112] "'Proceeds' are assets received as the direct product of an asset for which the defendant is liable in restitution to the claimant. 'Consequential gains' are profits realized through the defendant's subsequent dealings with such an asset, or through the defendant's interference with the claimant's rights. ... A conscious wrongdoer or a defaulting fiduciary is liable for proceeds and consequential gains that are not unduly remote...."

failed to establish that the Trial Court did not make a finding of fact as to the benefits Kunchick received, or that that finding was not supported by substantial evidence, or, lastly, that that finding did not support its calculation of damages/restitution.

4. *The Trial Court Properly Held Defendants Liable for Conversion Because They Exceeded the Scope of Mr. LaRock's Consent to Their Use of His Property, and Because They Refused to Return the Property upon His Demand.*

On the final page of their brief, Defendants argue that the Trial Court erred in holding them liable to LaRock for conversion, because he has consented to their use of his property.[113] This argument is irredeemably frivolous.

First, the Court need not consider the argument at all because it does not comply with RAP 2.5. It does not appear in Defendants' Assignments of Error, or Issues Pertaining to Assignments of Error;[114] it is not supported by a single citation to the record; and its sparse citations to legal authority fail to demonstrate any error. This Court has previously admonished that "[s]uch passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *See West v. Thurston Cnty.*, 168 Wn.App. 162, 187, 275 P.3d 1200, 1213 (2012)

[113] Appellants' Br., 19.

[114] Appellants' Br., 4–5.

(quoting *Holland v. City of Tacoma*, 90 Wn.App. 533, 538, 954 P.2d 290 (1998) (internal quotation marks and alteration omitted)). Given that standard, the Court would be well within its discretion to disregard this argument without further consideration.

The argument is equally absurd on the merits. Plaintiff brought this suit precisely to recover the property in question, because, as the record shows, Defendants refused to return it voluntarily.[115] Defendants cannot maintain that they have LaRock's permission to use his property, in defense to a suit by LaRock to recover that same property.

To establish a *prima facie* case of conversion, a plaintiff must prove that the defendant: (1) took or unlawfully retained property; (2) belonging to the plaintiff; (3) thereby depriving the plaintiff of rightful possession. *See Alhadeff v. Meridian on Bainbridge Island*, LLC, 167 Wn.2d 601, 619, 220 P.3d 1214, 1223 (2009). The Trial Court made findings of fact supporting each of these elements:

> 1. Defendants are in possession of the personal property described in paragraph B(1)(a)-(d) of this section, above (pp. 8-9), which was formerly in the possession of Peter LaRock and K&K.
>
> 2. LaRock allowed, or caused K&K to allow, defendants Kunchick and PCI to possess and use this property for the purpose of earning profits, in which he would be entitled to share.

[115] RP 67:22–68:16; CP 874.

> 3. Defendants have used, and continue to use, this property to earn profits, but refuse to share them with LaRock, and have likewise refused LaRock's demand for the property's return.[116]

Defendants have not assigned error to these findings, making them verities for purposes of this appeal. *See State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59, 76 (2006).

The Trial Court also made conclusions of law that Defendants' continued possession and use of the property constituted conversion:

> LaRock is the rightful owner of the personal property described in paragraph B(1)(a)-(d) of the previous section (pp. 8-9). By refusing to return this property to LaRock upon his demand, and by continuing to maintain possession and use of the property beyond the scope of LaRock's consent, defendants have willfully interfered with, and wrongfully withheld, chattel belonging to LaRock, depriving him, the rightful owner, of possession.
>
> ... Defendants are liable to plaintiff for conversion of this property.[117]

Defendants do not assign error to the Trial Court's conclusions that they have interfered with the property, or that their interference has deprived LaRock of use of the property.[118] These conclusions are therefore the law of the case. *See King Aircraft Sales, Inc. v. Lane*, 68 Wn.App. 706, 716-17, 846 P.2d 550, 556 (1993) ("An unchallenged conclusion of law becomes the law of the case," and "will not be disturbed on appeal.")

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[116] CP 874.
[117] CP 876.
[118] Appellants' Br., 19.

(citations omitted). In their argument regarding standing, Defendants challenged the Court's conclusion that LaRock is the rightful owner of the property, but Plaintiff has already shown that argument to be meritless.

For purposes of the present argument, then, Defendants' sole assignment of error is to the Trial Court's conclusion that their interference with LaRock's property was without lawful justification, which they claim they had, due to LaRock's initial consent to their use of the property.[119] The Trial Court's findings of fact, including the finding that LaRock previously consented to Defendants' use of his property, fully support its conclusion that Defendants' refusal to return the property, after that consent was revoked, was unlawful.

Consent to the use of property by another, at a specific time, or for a specific purpose, is not a defense to conversion if the property is used for a different purpose, or is not returned on demand. *See* Restatement (Second) of Torts, § 228 ("One who is authorized to make a particular use of a chattel, and uses it in a manner exceeding the authorization, is subject to liability for conversion to another whose right to control the use of the chattel is thereby seriously violated."), and § 237 (One in possession of a chattel as bailee or otherwise who, on demand, refuses without proper qualification to surrender it to another entitled to its immediate possession,

[119] Appellants' Br., 19.

is subject to liability for its conversion."). Even Defendants' own case law is in accord. *See Michel v. Melgren*, 70 Wn.App. 373, 378, 853 P.2d 940, 944 (1993) ("One who would otherwise be liable for conversion ... is not liable *to the extent* the other has effectively consented to the interference with his rights.") (citing Restatement (Second) of Torts § 252, at 482 (1965)) (emphasis added).

The Trial Court's findings of fact, cited above, establish that the purpose for which LaRock allowed Defendants to use his property was to "[earn] profits, in which he would be entitled to share," and that Defendants have used the property instead to earn profits solely for themselves. These findings further establish that, once Defendants refused to share PCI's profits with LaRock, they no longer had "proper qualification" to refuse LaRock's demand for the property's return. These findings not only support, but require, the conclusion that Defendants had no lawful justification for their interference with LaRock's rights to his property. This Court should therefore affirm the Trial Court's judgment against Defendants Edward Kunchick and PCI for conversion.

VI. CONCLUSION

For all the foregoing reasons, Respondent Peter LaRock respectfully requests that this Court AFFIRM the judgment entered by the Trial Court in this matter, and DENY Appellants' request for a new trial.

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CERTIFICATE OF SERVICE

I, Susan Camicia, swear under penalty of perjury and the laws of the State of Washington to the following:

1. I am over the age of 21 and not a party to this action.

2. On May 29, 2014, I caused the preceding document to be served on counsel of record in the following manner:

Edward C. Chung Chung, Malhas, Mantel & Robinson 600 First Avenue, Suite 403 Seattle WA 98104 Telephone: (206) 264-8999 Fax: (206) 264-9098	_____ Messenger __x__ Email *(per agreement)* _____ Facsimile _____ US Mail

Susan Camicia

APPENDIX 1

West's Ann.Cal.Civ.Code § 3439.07

§ 3439.07. Remedies of creditors

(a) In an action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations in Section 3439.08, may obtain:

(1) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim.

(2) An attachment or other provisional remedy against the asset transferred or its proceeds in accordance with the procedures described in Title 6.5 (commencing with Section 481.010) of Part 2 of the Code of Civil Procedure.

(3) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure, the following:

(A) An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or its proceeds.

(B) Appointment of a receiver to take charge of the asset transferred or its proceeds.

(C) Any other relief the circumstances may require.

(b) If a creditor has commenced an action on a claim against the debtor, the creditor may attach the asset transferred or its proceeds if the remedy of attachment is available in the action under applicable law and the property is subject to attachment in the hands of the transferee under applicable law.

(c) If a creditor has obtained a judgment on a claim against the debtor, the creditor may levy execution on the asset transferred or its proceeds.

(d) A creditor who is an assignee of a general assignment for the benefit of creditors, as defined in Section 493.010 of the Code of Civil Procedure, may exercise any and all of the rights and remedies specified in this section if they are available to any one or more creditors of the assignor who are beneficiaries of the assignment, and, in that event (1) only to the extent the rights or remedies are so available and (2) only for the benefit of those creditors whose rights are asserted by the assignee.

West's Ann. Cal. Civ. Code § 3439.07, CA CIVIL § 3439.07
Current with urgency legislation through Ch. 16 of 2014 Reg.Sess. and all propositions on the 6/3/2014 ballot.

APPENDIX 2

West's RCWA 19.40.071

19.40.071. Remedies of creditors

(a) In an action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations in RCW 19.40.081, may obtain:

(1) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;

(2) An attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the procedure prescribed by chapter 6.25 RCW;

(3) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure:

(i) An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;

(ii) Appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

(iii) Any other relief the circumstances may require.

(b) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.

Credits

[2000 c 171 § 54; 1987 c 444 § 7.]

West's RCWA 19.40.071, WA ST 19.40.071

Current with 2014 Legislation effective before June 12, 2014, the General Effective Date for the 2014 Regular Session